United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

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76-7616

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

In Re Franklin National Bank
Securities Litigation

ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated,
Plaintiff-Appellant,

and

LOUIS PERGAMENT,
Intervenor-Plaintiff-Appellant,

against

ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, and ROBERT C. PANEPINTO,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
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A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

BRIEF OF AMICI CURIAE

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No. 76-7616

PRELIMINARY STATEMENT

This brief is submitted by the Securities Industry Association ("SIA") and twenty-five broker-dealers, as amici curiae, to urge the affirmance of the orders of the Hon. Thomas

C. Platt of the United States District Court for the Eastern District of New York, dated October 27 and November 30, 1976.* The orders below held, inter alia, that plaintiffs in this class action proceeding must bear the costs and expenses of notifying members of the class and cannot shift that burden to non-party brokerage firms, banks and other nominees by imposing upon them the cost of identifying and notifying the beneficial owners of securities of Franklin New York Corporation ("Franklin") purchased and held in nominee or "street name" between July 16, 1973 through and including May 16, 1974.

The issues raised on this appeal are of considerable import to and impact directly upon the members of the securities industry. The SIA was formed in 1972 through the merger of the

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* This brief amici curiae is filed pursuant to the written consent of all parties to this appeal, dated January 21, 1977, in accordance with Rule 29 of the Federal Rules of Appellate Procedure. A copy of this consent is annexed hereto at pps. A1-A6. The twenty-five broker-dealers which also join in this brief are as follows: Bache, Halsey Stuart, Inc., Bear, Stearns & Co., Blyth Eastman Dillon & Co., Inc., Bruns, Nordeman, Rea & Co., Donaldson Lufkin & Jenrette, Inc., Drexel Burnham & Co., Inc., First Manhattan Co., Goldman, Sachs & Co., E.F. Hutton & Company, Inc., Hornblower & Weeks-Hemphill Noyes, Josephthal & Co., Kidder, Peabody & Co., Inc., Lehman Brothers, Loeb, Rhoades & Co., Mitchell, Hutchins, Inc., Oppenheimer & Co., Inc., Paine, Webber, Jackson & Curtis, Inc., Reynolds Securities, Inc., Salomon Brothers, L.F. Rothschild & Co., Shearson Hayden Stone, Inc., Shields, Model, Roland, Inc., Wertheim & Co., Dean Witter & Co., Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc.

Association of Stock Exchange Firms and the Investment Bankers Association of America. The SIA has approximately 640 members from all parts of the United States, all of whom are engaged in the securities business. The SIA is generally recognized as spokesman for the securities industry to the public and to the Government.

QUESTION PRESENTED

Whether non-party brokerage firms and other nominees which have no interest in the outcome of this proceeding should be required to bear the expense of identifying the beneficial owners of securities, held of record during a prescribed period but for whom such firms no longer hold such securities, by compiling the names and addresses of such persons through the use of research and/or computer facilities and creating a record which otherwise does not exist, in order to assist plaintiff in discharging its obligations to provide notice of the pendency of this class action proceeding to each individual member of the class who can be identified through reasonable effort?

STATEMENT OF THE CASE

We adopt the statement of relevant facts and prior proceedings set forth at pps. 2-5 of appellee's brief. We would emphasize that the issues here presented for review arise

in the traditional context of a motion by the class representatives for certification of this proceeding as a class action and determination as to the manner and form of providing individual notice to each member of the class who can be identified through reasonable effort. The order which appellants sought but failed to obtain below typifies a recent trend by which class action representatives seek to subsidize the financial costs of their lawsuit by attempting to shift both the cost and burden of identifying the beneficial owners of securities to non-party brokers and nominees which are listed on the issuer's stock transfer records as having been the registered owners of securities during the period which defines membership in the class (i.e., July 16, 1973 through May 16, 1974) but which no longer hold such securities of record. Members of the securities industry have resisted the imposition of such identification costs as being without legal basis.*

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*As more fully discussed infra at pp. 18, 19, twelve of the brokerage firms joining in this brief have heretofore brought a special proceeding in Jahre v. Rait, 74 Civ. 805 (E.D.N.Y. Oct. 15, 1976) which successfully challenged and resulted in the vacatur, by Judge Weinstein, of an ex parte order which sought to require brokerage firms and other nominees to search their records, either manually or by computer processes, to identify the beneficial owners of securities of Pelorex Corporation purchased and held of record during a specified period, without reimbursement for the costs to be incurred.

This Court is, of course, aware of the varied and substantial record-keeping functions performed by members of the securities industry which enable issuers to communicate with their shareholders. These include the transmittal of proxy materials, interim and annual reports and other materials to the current beneficial owners of stock registered in street or nominee name. However, brokerage firms and other nominees do not maintain in their ordinary business records a list or compilation of names and addresses of non-current beneficial owners of a particular security purchased during a prior specified period created solely for purposes of defining membership in a class action.

In order to identify the names and addresses of such beneficial owners, brokers and nominees must utilize their computer resources or undertake lengthy and burdensome manual procedures to extract that information from their master trading records and actually compile the requested data in a separate record which does not otherwise exist. (See, e.g., A 207). Whether the process is computerized or manual, a search must be made of each year covering any portion of the class period to determine the existence of any transactions respecting the particular security. Cross-searches are also necessary to obtain

names and addresses which correspond to customer account numbers identified in the initial process. Prior to completing the initial search and incurring the costs involved, there is no means of determining whether, in fact, the brokers or nominees were holders of records of the particular security purchased during the class period. In some instances, class action plaintiffs have been offered the use of brokers stock records, on a confidential basis, from which they could obtain the identities of the class members at their own expense. See, e.g., p. 19, infra.

Brokers and nominees have been generally willing to utilize their resources and facilities to cooperate with and assist plaintiff class representatives in identifying and notifying members of the class for whom they were the record owners of stock during the class period or for whom they currently hold such securities. However, as non-parties to this and similar proceedings, they only seek to be reimbursed for their research costs and mailing and handling expenses incurred in utilizing computer or manual research facilities in accordance with well-established procedures embodied in rules and regulations of the National Association of Securities Dealers ("NASD") and the New

York and American Stock Exchanges.* See Point II, infra.

SUMMARY OF ARGUMENT

Plaintiffs, as class representatives, have voluntarily chosen to represent in this proceeding all persons which purchased Franklin securities between July 16, 1973 and May 16, 1974, a period determined by plaintiffs to define the scope of this particular class action. This class includes the beneficial owners of Franklin securities purchased during that period. Having chosen to represent the entire class, plaintiffs must bear the cost of notifying each member of the class who can be identified with reasonable effort. That cost necessarily includes the expense of compiling the names and addresses of class members.

Plaintiffs cannot shift their obligations to identify and notify members of the class by seeking to impose that obligation upon brokerage firms and other nominees which are not parties to the class action and have no interest in its outcome. Such firms maintain no record containing the names and addresses of the former beneficial owners of Franklin securities which are or may be part of the class and the record-keeping functions performed

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* Plaintiffs have acknowledged their willingness to reimburse brokers and nominees for the cost of mailing notices to members of the class. Plaintiffs' Brief, p. 20 (hereafter cited as "Pl. Br.").

by members of the securities industry bear no relationship to the special needs of class action plaintiffs. While brokers and nominees routinely transmit notifications on behalf of issuers seeking to communicate with current shareholders, the forwarding of such materials is expressly conditioned upon reimbursement by the issuers for the costs and expenses incurred. In striking contrast, the process of identifying beneficial owners of securities is far from routine and the requisite information must be extracted and compiled from daily trading records through the use of manual or computer processes. The only persons who stand to benefit are private litigants which are unwilling to bear the costs necessary to prosecute and ultimately vindicate their claims.

Non-party brokers and other nominees have no obligation to perform such services and, if their cooperation is sought, they must be reimbursed for their reasonable costs and expenses. Any determination to the contrary would violate fundamental principles of fairness and equity and would impermissibly require strangers to this proceeding to subsidize the financial obligation of prosecuting this class action which rests exclusively upon plaintiffs as the class representatives. Accordingly, the orders below should be in all respects affirmed.

ARGUMENT

POINT I

NON-PARTY BROKERAGE FIRMS AND NOMINEES HAVE NO OBLIGATION TO BEAR THE COSTS OF IDENTIFYING MEMBERS OF THE CLASS

The threshold question presented for review is whether brokerage firms and other nominees which are not parties to this class action and have no stake or interest in its outcome can be compelled to bear the costs of identifying the beneficial owners of securities purchased in street or nominee name but for whom they no longer hold such securities of record. Plaintiffs acknowledge, as they must, their statutory obligation voluntarily undertaken to give notice to each member of the class who can be identified through reasonable effort but seek to impose that duty upon strangers to this action, either directly by contending that brokers and nominees have an independent obligation to advise class members which held stock in street or nominee name of the pendency of the class action, or indirectly upon the theory that notice to the registered owner is sufficient notice to the beneficial owner. We respectfully disagree and submit that neither theory provides any basis for requiring non-parties to render substantial services without compensation or reimbursement in order to permit the class representatives to discharge their obligations to the class.

A. PLAINTIFFS, AS CLASS REPRESENTATIVES, ARE REQUIRED TO GIVE NOTICE TO EACH BENEFICIAL OWNER WHO IS A MEMBER OF THE CLASS AND TO BEAR THE COST OF SUCH NOTICE.

This class action is maintained under Rule 23(b) of the Federal Rules of Civil Procedure and, accordingly, the question of notification to members of the class is controlled by Rule 23(c)(2) which provides, in pertinent part:

> "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

As held by the Supreme Court in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), ("Eisen IV"), Rule 23 imposes a mandatory requirement that "individual notice be sent to all class members who can be identified with reasonable effort". 417 U.S. at 176-77; see also Advisory Committee's Note to Rule 23, 39 F.R.D. 69,107 (1966). This obligation carries with it the concomitant responsibility that "plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit." Eisen IV, supra, 417 U.S. at 178-79. As observed by Judge Cannella in Popkin v. Wheelabrator-Frye, Inc., 20 F.R. Serv.2d 125, 130 (S.D.N.Y. 1975), "no other rule would be acceptable" even though

its enforcement may prove an "insurmountable obstacle to class action plaintiffs." See also Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 570 (2d Cir. 1968).

Even prior to Eisen IV, there was a clear recognition that "[m]ere notice to the broker is not reasonably calculated to reach the customer." Lamb v. United Security Life Co., 59 F.R.D. 25, 43 (S.D. Iowa 1972); Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969). In Miller v. Alexander Grant & Co., CCH Fed. Sec. L. Rep., [1971 Transfer Binder] ¶93,287 (E.D.N.Y. 1971), the Court expressly recognized that notice would have to be given to the beneficial owners of stock standing in the names of brokerage houses or their nominees. Similarly, in Herbst v. Able, 47 F.R.D. 11, 18 (S.D.N.Y. 1969), modified on other grounds, 49 F.R.D. 286 (S.D.N.Y. 1970), plaintiff, with defendant's assistance, was directed "to locate the original beneficial owners" of the securities which were there in issue. See also In re Memorex Security Cases, 61 F.R.D. 88, 103 (N.D. Cal. 1973). Consistent with the mandate of Rule 23, other class action plaintiffs have recognized their obligation to identify and give notice to all members of the class and that the beneficial owners of securities can be identified through reasonable effort, albeit by the expedient device of seeking to unilaterally impose the costs of such identification

upon non-party brokers and nominees. See, e.g., Jahre v. Rait, supra; Frankenstein v. McCrory Corp., 74 Civ. 727 (S.D.N.Y., Order of November 14, 1975)*; Weiss v. Drew National Corp., 75 Civ. 4816 (S.D.N.Y. July 15, 1975).**

Rather than evidence a commitment to the statutory and fiduciary duties of class representatives to the class they have chosen to represent, the contrary arguments advanced at pps. 20-29 of plaintiffs' brief carefully seek to circumscribe those duties and would emasculate the mandatory requirement of notice to each member of the class who can be identified through reasonable effort. As recently observed in Popkin v. Wheelabrator-Frye, Inc., CCH Fed. Sec. L. Rep. [1975-76 Transfer Binder] ¶95,411 at 99089 (S.D.N.Y. January 12, 1976) such a position is "unbecoming to a class representative." Nor do the authorities relied upon

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* In McCrory, plaintiffs obtained an ex parte order directing various non-party brokerage firms, at their own cost and expense, to identify and furnish to plaintiffs' counsel the names and addresses of those persons or entities which were the beneficial owners of the underlying securities during the prior period which defined the scope of the class. Following objections by certain brokers, a Stipulation and Order dated April 13, 1976 and filed with the Court on May 12, 1976 was entered into providing for reimbursement to the objecting brokers for their reasonable costs and expenses incurred in furnishing the requested information.

** As more fully discussed, infra, p. 18, the Court in Weiss rejected plaintiff's attempt to impose the costs of notification upon non-party brokerage firms. In a memorandum decision dated July 15, 1976, the Court ordered that plaintiff bear the expense of identifying the names and addresses of the beneficial owners of securities of Drew National Corp. purchased during the class period.

support the conclusion that plaintiffs can discharge their obligations to the class and avoid the imposition of identification costs by merely giving notice to the registered owner which held the securities during the designated prior period. In both In re Four Seasons Securities Laws Litigation, 63 F.R.D. 422 (W.D. Okla. 1974) and In re National Student Marketing Litigation v. Barnes Plaintiffs, 530 F.2d 1012 (D.C. Cir. 1976), the issue was whether certain members of the class could opt out of the settlement after the date fixed by the Court on the theory that notice sent to the registered owner was inadequate. In each instance the request was refused, the Court noting that the class notice was in fact forwarded by brokers to their customers. 63 F.R.D. at 427 and 530 F.2d at 1015. With respect to the unreported decision in In re Clinton Oil Company Securities Litigation, M.D.L. #137 (D. Kan., January 8, 1975), the Court, relying upon the decision in Eisen IV as authority, declined to require plaintiffs to give actual notice to each beneficial owner of securities included within the class and, in a subsequent order, directed non-party brokerage firms to give such notice. There is no indication in either the decision or order that any non-party brokerage firm was apprised of these proceedings or given an opportunity to be heard in opposition thereto. We respectfully submit that that determination is unsupported by and contrary to established precedent and should not be followed herein.

B. NO EXCEPTION TO THE HOLDING IN EISEN IV EXISTS WHICH WOULD REQUIRE NON-PARTY BROKERS AND NOMINEES TO BEAR THE COST OF IDENTIFICATION

Plaintiffs' use of the class certification motion as a vehicle for shifting their burden to finance the cost of their lawsuit is merely an attempt to relitigate in another context the issue which was adjudicated by the Supreme Court in Eisen IV. Prior thereto, the expenses of notification would often be imposed in whole or in part upon the defendants to the class action. See, e.g., Miller v. Alexander Grant & Co., supra. Indeed, in Eisen, following an appeal to this Court, 391 F.2d 555 (2d Cir. 1968) and a preliminary hearing in which the plaintiff was found likely to prevail on the merits, the District Court ordered individual notice to be given to only 7,000 of approximately 2,500,000 identifiable class members. 52 F.R.D. 253, 267 (S.D.N.Y. 1971). Approximately 90% of the cost of such notice was imposed upon defendants. 54 F.R.D. 565, 573 (S.D.N.Y. 1972). This Court reversed, holding that all members of the class who could be reasonably identified were entitled to notice and that plaintiff was required to bear the cost of that notice. 479 F.2d 1005, 1015 (2d Cir. 1973). The Supreme Court agreed, holding that where "the relationship of the parties is truly adversary, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit." Eisen IV, supra, 417 U.S. at 178-79. Because of plaintiff's insistence

that he would not bear the cost of notice to members of the class as originally defined, the Supreme Court remanded the case "with instructions to dismiss the class action as so defined." Id. at 179.

The Supreme Court in Eisen IV did not foreclose the possibility that under special circumstances the cost of notice might be imposed upon defendants to a class action, such as "where a fiduciary duty pre-existed between the plaintiff and defendant, as in a shareholder derivative suit." 417 U.S. at 178. Nevertheless, no exception to the rule expounded in Eisen IV here exists so as to permit the imposition of notice costs upon non-parties to a class action in which they have no stake or interest and will be unaffected by the outcome. This conclusion is compelled by the recent decision of this Court in Sanders v. Levy, ____F.2d____, 21 F.R. Serv. 2d 1213 (2d Cir. June 30, 1976).*

Sanders, a class action under Rule 23(b)3, Fed. R. Civ. P., involved an appeal from a District Court decision which, inter alia, directed defendant Oppenheimer Fund, Inc., which was not a party to the class action claims, to bear substantial costs

* A petition for rehearing en banc was granted on September 14, 1976 and final disposition is presently pending. Plaintiffs concede that "the existing Sanders v. Levy decision is, of course, the law in this circuit." Pl. Br. at 24.

in identifying the class members by extracting the names and addresses of the class members from magnetic computer tapes maintained by the transfer agent for the Fund. In reversing the order of the District Court, this Court reached the following conclusions equally applicable to the case at bar:

> "But the relationship between the plaintiffs and the Fund is not non-adversarial in a manner which requires an exception to the Eisen IV rule on notification costs, but in a manner that makes it totally improper to impose costs on the Fund: the Fund is not a party to the class action claims. No recovery is sought from the Fund in the class action. The plaintiffs have been careful to exclude the Fund itself from all allegations of wrong-doing and to seek recovery only from its directors, its managing company and the broker-dealer firm that controls the manager. Indeed, the Fund appears to have been named as a defendant only for purposes of the derivative claims which are not of concern here. Since the Fund has no direct interest in the outcome of the class action claim, it is too remotely involved to have notification costs imposed upon it."* (Emphasis supplied) Sanders v. Levy, supra at 1216.

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* The Court further observed that these identification costs could not even be imposed upon those other defendants which arguably had some fiduciary duty to the plaintiff shareholders. With respect to the argument that the financial burden to plaintiff was a justification for imposing the cost of identification upon defendants, this Court stated:

> "The result in Eisen IV leaves no doubt that the ability of a defendant to bear the costs and the fact that, if it does not, the suit will have to be discontinued, are to be given little or no weight." Id. at 1216.

Plaintiffs raise the identical arguments at pps. 45-47 of their brief and they should similarly be rejected.

Plaintiff in Sanders attempted to distinguish the ruling in Eisen IV by claiming that the cost of identifying the members of the class was different from the cost of notification. This argument was categorically rejected by this Court which held that "the cost of obtaining the name and address to be affixed to the envelope does not differ in kind from the cost of printing and procuring, stuffing and posting the envelopes." Id. at 1218. These are the identical costs which plaintiffs sought to impose upon brokerage firms and other nominees in the court below. If Oppenheimer Fund, Inc., which was joined only as a nominal defendant, against which no recovery was sought and which had no interest in the outcome of the proceeding, could not be compelled to bear the cost of identifying and notifying members of the class in Sanders, a fortiori, non-party brokerage firms and nominees which are uninterested in, unaffected by and further removed from this class action cannot be compelled to bear such costs.*

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* Plaintiffs seek to distinguish Sanders upon the ground that the question of whether non-parties should bear the cost of identifying beneficial owners, as opposed to record owners, was not at issue. We submit that this distinction is without basis and irrelevant to the Court's holdings that (a) individual notice must be sent to each class member who can be identified through reasonable effort; (b) the costs of identification are part of the costs of notice which are to be borne by plaintiff; and (c) such costs cannot even be imposed upon defendants which have no interest in the outcome of the proceeding.

Following the decision in Sanders, the District Court in Weiss v. Drew National Corp., 75 Civ. 4816 (S.D.N.Y. July 15, 1976) considered the precise question raised upon this appeal. Plaintiff had submitted a proposed order in connection with a class certification notice which sought to impose upon non-party brokerage firms the cost of forwarding class action notices to class members. Defendants' proposed counter-order required plaintiff to bear such costs. Applying the determinations reached in Sanders, Judge Stewart held that "plaintiff, and not the brokerage firms, must bear the cost of notifying class members."

A similar result in a different context was reached in a class action entitled Jahre v. Rait, 74 Civ. 805 (E.D.N.Y.), in which twelve brokerage firms commenced a special proceeding to vacate an ex parte order purporting to require banks, brokerage firms and other nominees to transmit various class notices to the beneficial owners of the common stock of Pelorex Corporation purchased during the particular period by which the class was defined. In the Matter of the Order dated May 19, 1976 per the Hon. Jack B. Weinstein Purporting to Compel Various Brokerage Firms to Render Services Without Reimbursement, 76 Civ. 1305 (E.D.N.Y. filed July 16, 1976). The challenged ex parte order failed to

provide for reimbursement for the expenses of identification and, as to notification, merely provided that these non-parties could "request reimbursement for mailing costs, or supply the names and address of such beneficial owners . . . without cost."* By Order dated October 15, 1976, Judge Weinstein directed that the underlying order be vacated.**

The principal justification relied upon for requiring non-party brokerage firms and other nominees to bear the cost of identifying the beneficial owners of securities in connection with a class action is the industry-wide practice of recording the ownership of securities in a name other than that of the beneficial owner. Thus, in In re Penn Central Securities Litigation, 416 F. Supp. 907 (E.D. Pa. 1976), appeal pending, No. 76-2139 (3d Cir., filed July 19, 1976), the District Court, in a lengthy opinion devoted almost entirely to applications for the award of

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* Significantly, most if not all of the brokers which challenged the ex parte order there issued offered to make their stock records available, on a confidential basis, to counsel for the parties so that they would perform the research and extract and compile the information necessary to identify the beneficial owners of securities, at their own expense. These offers were refused.

**A copy of this order, which is unreported, is annexed hereto at pp. A7-A8. Plaintiffs are inaccurate in their statement that the question was mooted by the entry of a subsequent order dispensing with the need for further notice to the class. Pl. Br. at 29. That order was entered as a result of the determination of the issues as recited above and Judge Weinstein's Order of vacatur, dated October 15, 1976.

counsel fees, denied a request by various brokers for reimbursement of costs incurred in forwarding class action notices to the beneficial owners of the securities there involved. In two paragraphs devoted to this issue, the Court reasoned that:

> "[T]here is simply no reason to require the entire class to pay for the choice of a few to have their stock held in street name." 416 F. Supp. at 921.

The rationale in Penn Central rests upon the false assumption and basic misconception that street-name ownership of securities is merely an accommodation to a few . To the contrary, the practice of holding stock in street or nominee name is the mechanism by which the vast majority of securities transactions is accomplished. According to the recently issued Final Report of the Securities and Exchange Commission on "The Practice of Recording the Ownership of Securities in the Records of the Issuer in Other than the Name of the Beneficial Owner of Such Securities", dated December 3, 1976 ("SEC Street-Name Study, Final Report") in 1975, approximately 28.6% of all shares issued and outstanding of publicly-held equity securities were held in nominee or street-name. SEC Street-Name Study, Final Report, p. 79. Even more telling is the fact that over 95% of common stock transactions on the New York and American Stock Exchanges are currently settled by book entry

delivery through the Depository Trust Company, thus facilitating the transfer of securities without movement of certificates or the transfer of record ownership. SEC Street-Name Study, Final Report, p. 12. Although the record before this Court is silent as to the extent to which members of the class purchased and held their stock in street name, that percentage is undoubtedly substantial.

With respect to the continued efficacy of street-name and nominee registration and the consideration of alternative systems, the Securities and Exchange Commission has concluded that this practice "benefits investors and the securities industry by facilitating the transfer of record ownership and the clearance and settlement of securities transactions" and "is integral to the operation of securities depositories." SEC Street Name Study, Final Report, p. 5. The Commission recommended that "no steps be taken which would discourage the use of nominee or street name registration or diminish the benefits which the practice provides." Id. at 6.

The Commission's report included a specific study on the advisability of establishing new procedures for effecting direct communications between issuers and shareholders. Special consideration was given to the disclosure of beneficial ownership by banks, brokers and nominees to the issuers which would

then distribute communications and dividends directly to the shareholders. See generally pps. 56-60. Again, the Commission s findings supported the present system with particular regard for the heavy record-keeping burden which the various alternatives would impose:

> "Each method considered for effecting direct communications would have seriously disrupted the securities markets or would have imposed financial and record-keeping burdens on brokers, banks, or issuers. Imposition of these burdens cannot be justified absent a finding, which the Commission was unable to make, that the existing communications system is seriously dificient." Id. at 7.
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> * * *
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> "The Commission has concluded that no alternative approach would facilitate shareowner communications without disrupting the current system of clearance and settlement, imposing significant costs and recordkeeping requirements on participants, or involving major computer development. In view of the Commission's conclusion that the current system is adequate, the Commission believes that imposition of the substantial burdens involved in implementing an alternative system is not justified." Id. at 62.

We would emphasize that the entirety of this discussion is in the context of alternatives which might improve communications between issuers and existing shareholders. It is, we submit, unreasonable to attack what has proven to be a viable and highly effective system of facilitating securities transactions simply because that system does not meet the peculiar needs of class-action

plaintiffs and their counsel. As for the suggestion that brokers benefit financially from the system of street-name ownership, the record of failures among brokerage firms in recent years demonstrates that levels of profitability are not as depicted by plaintiffs and certainly are not dependent upon nor derived in any substantial part from the system of street-name ownership. In an age of intense competition arising from the deregulation of commission rates, brokerage firms face reduced profits in order to pass on increased benefits to investors. In short, the system of street-name and nominee registration of securities provides no justification for the imposition of identification costs upon members of the securities industry and, indeed raises a false issue since, as previously demonstrated, the identities of beneficial owners of securities can be obtained through "reasonable effort."

C. NON-PARTY BROKERS AND NOMINEES CANNOT BE REQUIRED TO COMPILE DATA TO AID IN THE IDENTIFICATION OF CLASS MEMBERS

In Sanders v. Levy, supra, plaintiffs sought to justify the imposition of identification costs upon defendant Oppenheimer Fund, Inc. by analogizing to the federal discovery rules. In rejecting this reasoning, this Court stated that even "if the rules of discovery were applicable, it appears unlikely that they

would require that defendants bear the identification costs here." (Emphasis supplied) Sanders v. Levy, supra at 1218. A brief analogy to the various discovery devices available to obtain information and documents from non-parties reinforces the conclusion that broker and nominees cannot be compelled to compile data to aid in the identification of class members.

1. Rule 45 Fed.R.Civ.P. The service of a subpoena duces tecum is perhaps the most direct way of obtaining access to stock trading records from which the names and addresses of beneficial owners of securities held during the class period may be extracted and compiled and the identities of class members ascertained. However, the service of a subpoena pursuant to Rule 45(b) does not require third parties to do anything more than produce designated documents. As observed by Professor Moore:

> "Rule 45(b) does not require the witness to prepare papers for the adverse party or to compile information contained in the documents referred to, but only to produce designated documents; and, where the subpoena duces tecum calls for relevant information which the party subpoenaed must compile or select from records which are largely irrelevant or privileged, a fair solution of the problem is to have the party or witness who is subpoenaed compile the information at the expense of the party calling for it." (Emphasis supplied) 5A Moore's Federal Practice ¶45.05[1] (2d ed. 1975); See also Novak v. General Elec. Co., 10 F.R.Serv. 2d 45b. 31, Case 2 (S.D.N.Y. 1967); Miller v. Sun Chemical Corp., 12 F.R.D. 181 (D.N.J. 1952); Ulrich v. Ethyl Gasoline Corp., 2 F.R.D. 357 (W.D. Ky. 1942).

Rule 45(b) expressly recognizes that a subpoena, if unreasonable or oppressive, is subject to a motion to quash or modify. The denial of such a motion may be and often is conditioned upon the advancement by the party serving the subpoena of the reasonable costs of compliance therewith. The application of this aspect of Rule 45(b) is illustrated by the case of Ulrich v. Ethyl Gasoline Corporation, supra, in which plaintiffs served a subpoena duces tecum upon the defendant requiring the defendant to furnish plaintiff with a list of names and addresses of various jobbers to whom defendant had issued licenses. In rejecting plaintiffs' contentions that defendant could be required to compile the requested information, the Court stated that "[s]ince the burden of compiling this information is upon the plaintiffs I believe that the defendant should not be required to bring this information into Court in its condensed form except upon pre-payment by the plaintiffs of the reasonable cost of doing the same." (Emphasis supplied). 2 F.R.D. at 360.*

* Plaintiffs' reliance upon Blank v. Talley Industries, Inc., 54 F.R.D. 627 (S.D.N.Y. 1972) as support for the proposition that brokers need not be reimbursed for costs incurred in supplying the names and addresses of beneficial owners of securities requested pursuant to a subpoena is inapposite. That case merely involved an exercise of judicial discretion in refusing to reimburse one broker for the cost of identifying the stockholders of General Tire Corporation as of the close of business on April 13, 1970. Significantly, a record in the form of a daily stock summary would exist from which the identities of the beneficial owners of a security as of a specific date could be obtained. This is a substantially different and less costly procedure than that required in order to ascertain the identities of the beneficial owners of securities held or purchased between July 16, 1973

[Footnote continued on next page]

2. Rule 33 Fed.R.Civ.P. As between parties to an action, relevant information may also be obtained through the use of written interrogatories. However, in order to protect parties from answering burdensome interrogatories or from extracting and compiling information from books and records which could be made available to the party seeking discovery, Rule 33(c) affords the party to whom the interrogatories are directed the option of producing its business records from which the requested information can be extracted, compiled or summarized. As indicated in the Advisory Committee's Note to Rule 33(c) which was adopted as part of the 1970 amendments to the Federal Rules of Civil Procedure, this subdivision does not deprive a party of any right to seek a protective order under Rule 26(c) to require the party seeking discovery to reimburse it for the cost and expense incurred in assembling such business records and making them intelligible. See 4A Moore's Federal Practice ¶33.01[6] (2d ed. 1975).

As the foregoing demonstrates, under Rule 33(c), a party will not be required to undertake the burdensome task of extracting and compiling information from documents and records which can be made available to the party seeking such discovery. Sanders v. Levy, supra at 1218; see also Tytell v. Richardson-

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[Footnote continued from previous page]
through May 16, 1974 -- as in the case at bar -- or some other arbitrary period peculiar to and which defines the scope of a particular class action and which bears no relationship to the record-keeping facilities and capacities maintained by brokers and nominees.

Merrell, Inc., 37 F.R.D. 351 (S.D.N.Y. 1965); Konczakowski v. Paramount Pictures, Inc., 20 F.R.D. 588 (S.D.N.Y. 1957); Triangle Mfg. Co. v. Paramount Bag Mfg. Co., 35 F.R.D. 540 (E.D.N.Y. 1964). Manifestly, non-party brokerage firms and nominees should not be compelled to undertake a similar burden.

3. Rule 34 Fed.R.Civ.P. In light of the availability of a subpoena duces tecum to obtain documents from non-parties, the provisions for a request for the production of documents for inspection and copying under Rule 34 are inapplicable to the issues raised herein. Nevertheless, the scope and purpose of Rule 34 and the procedures contemplated thereby underscores the inherent inequity in plaintiffs' position. As observed in Sanders v. Levy, supra:

> "The task of culling relevant names and addresses from a long list, as confronts the parties here, is a distinctly different one from the production for inspection and copying with which Rule 34 is concerned. If 'sophisticated electronic manipulation and analysis' become necessary, 'the courts will have to become increasingly sensitive to problems of expense and the utilization of an opponent's computer assets.' 8 C. Wright and A. Miller, Federal Practice & Procedure §2218 at 659 (1970)." (Emphasis Supplied). Sanders v. Levy, supra at 1218-19 fn.

4. Tax Reform Act of 1976. Consistent with the principle that the costs of producing records or compiling in-

formation should not be imposed upon uninterested non-parties to a legal action or administrative proceeding, the Tax Reform Act of 1976 (the "Act") has made specific provision for reimbursement to banks, brokerage firms and other third parties for costs of searching, copying and transporting records in response to and compliance with an IRS third-party summons. Pub.L. 94-455, Title XII, §1205(a), Oct. 4, 1976, 90 Stat. 1699. Effective December 31, 1976 as to all such summonses issued after February 28, 1977, parties which receive such summonses are entitled to reimbursement in accordance with regulations established pursuant to Sec. 7610 of the Act. Internal Revenue Code of 1954, as amended, 26 U.S.C. §§7609, 7610. Such reimbursable costs include those incurred in searching for documents or extracting information and include the actual costs of retrieving information stored by a computer:

> "The IRS advised third parties served with summonses to maintain careful records of personnel search time, computer costs, number of copies made of documents and transportation costs. After compliance with the particular summons, itemized bills may be submitted either directly to the IRS employee who issued the summons or by mail to the appropriate IRS office.
>
> Search costs are payable at the rate of $5 an hour, limited to the search for and retrieval of documents or information requested by the summons. In addition, the actual costs of retrieving information stored by a computer are also reimbursable." IRS News Release IR-1736, January 14, 1977.

D. BROKERS AND NOMINEES HAVE NO FIDUCIARY DUTY TO IDENTIFY BENEFICIAL OWNERS OF SECURITIES FOR WHOM THEY ARE NO LONGER THE HOLDERS OF RECORD

Plaintiffs urge the existence of a fiduciary obligation of brokers to their customers as another justification for imposing upon non-parties to a class action the cost of identifying the beneficial owners of securities purchased during the particular period which defines the class. (Pl. Br. at 40-43). Apart from the identification of current customers which may presently be the beneficial owners of Franklin securities and members of the class, the imposition of such an obligation would require brokers and nominees to search their records to identify former customers for whom they no longer hold such securities of record and as to which a broker-customer relationship no longer exists. We submit that brokers and nominees have no obligation to identify and/or forward class notices to beneficial owners of securities for whom they are no longer the record owners.*

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* To the extent, if any, that brokers have a fiduciary duty to identify or forward class notices to their current or former customers, we question whether plaintiffs have standing to invoke the existence of such an obligation as a basis for requiring non-parties to subsidize their obligation to bear the cost of notice to the class.

The very concept of a "fiduciary" presumes the existence of an underlying relationship between parties. To impose upon that relationship the label "fiduciary" begs the question as to whether any obligations exist by one party to another. In the context of the class notification process, the assumption that a broker or nominee has any obligation to a class member is plainly false since the costly task of searching prior records may reveal that none of the securities involved were purchased or held of record during the class period on behalf of a beneficial owner. In addition, a broker's relationship with his cusomter is predicated upon fundamental principles of agency which is a "consensual relationship" arising when a customer places an order and a broker agrees to execute it. Le Marchant v. Moore, 150 N.Y. 209 (1896). That agency relationship normally terminates upon the execution of the order and, except as otherwise required by applicable rules and regulations respecting the transmittal of issuer information to current shareholders,* the duty of the agent to transmit notifications thereafter received concerning that order also terminates.

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* See Point II, infra. As hereafter more fully discussed, the broker's obligation to transmit such information is expressly conditioned upon reimbursement by the issuer for all reasonable costs and expenses incurred.

Robinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 337 F. Supp. 107, 111 (N.D. Ala. 1971); see also, e.g., Restatement Second of Agency §§105, 106, 110; 12 Am. Jur. 2d, Brokers §§83, 89 at 863 and 843 (1964).

Even apart from basic concepts of agency, the statutory duties imposed upon brokerage firms to transmit materials to current beneficial owners of securities presently held of record are limited and, in the absence of compelling circumstances, a general duty to notify present customers will not be implied. In Karl E. Sommerlatte, CCH Fed. Sec. L. Rep. [1971-72 Transfer Binder] ¶78,557 (Oct. 8, 1971), an attorney made an inquiry to the SEC's Division of Trading and Markets as to whether the rules and regulations promulgated under the Securities and Exchange Act of 1934 required (a) an issuer to give notice to holders of its bonds or convertible debentures when those securities were called for redemption and (b) a brokerage firm holding such securities in a customer account to give such notice. The SEC replied that "[t]here are no provisions under the federal securities laws specifically relating to notices of the kind you mention in your letter...."

None of the authorities relied upon by plaintiffs supports the proposition that a broker has a duty to transmit class

action notices to former customers who have long since disposed of their securities and thus terminated any relationship with their broker which may have existed at the time they purchased such securities.* For example, Opper v. Hancock Securities Corp., 250 F. Supp. 668 (S.D.N.Y. 1966) involved a broker's failure to faithfully execute a customer's order to sell shares of stock. In Barnett v. United States, 319 F.2d 340 (8th Cir. 1963), the Court upheld an administrative order of the Securities and Exchange Commission revoking the registration of a broker-dealer for alleged violations of the anti-fraud provisions of the Securities and Exchange Act of 1934 committed in connection with certain recommendations and the failure to execute a customer's order to sell certain securities. Thus, non-party brokers and nominees are being

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* Plaintiffs' related contention that notice to the record owner is sufficient as to the beneficial owner is similarly inapposite and, by definition, has no application to the situation where brokers and nominees no longer hold securities of record for members of the class. Moreover, this Court's decision in Drachman v. Harvey, 453 F.2d 722 (2d Cir. 1971), recognized that the rights of a beneficial owner of securities cannot be abrogated by placing the form of ownership over substance and held that a beneficial owner had standing to maintain a shareholder's derivative action under the federal securities laws despite a state law limiting such right to the registered owner. That result clearly obtains in class actions where the class representative has a mandatory duty, imposed by statute and transcending normal notice requirements, to notify each individual class member who can be identified through reasonable efforts. Popkin v. Wheelabrator-Frye, Inc., supra, CCH Fed. Sec. L. Rep. [1975-76 Transfer Binder] ¶95,411 (S.D.N.Y. January 12, 1976).

asked to render substantial services which they otherwise have no duty to provide, without compensation or reimbursement, for private litigants who ultimately stand to benefit but who are unwilling to bear the cost of financing their claims on behalf of themselves and the class they chose to represent.

POINT II

NON-PARTY BROKERS AND NOMINEES MUST BE REIMBURSED FOR ALL COSTS AND EXPENSES INCURRED IN IDENTIFYING CLASS MEMBERS

The rules and regulations promulgated by The Securities and Exchange Commission under the Securities and Exchange Act of 1934, the rules of the NYSE and other exchanges and the self-regulating rules and procedures of the NASD have long recognized the propriety of reimbursement by the issuer of securities to brokerage firms for costs incurred in mailing proxy materials, annual and interim financial reports and other materials to current beneficial owners of securities. We submit that reimbursement of costs and expenses incurred by non-party brokers and nominees in identifying beneficial owners of securities no longer held of record is similarly mandated.

The obligation of an issuer of securities to reimburse brokerage firms for its reasonable expenses incurred in mailing

proxy materials to current beneficial owners of securities is expressly provided for in Rule 14a-3(d) promulgated pursuant to §14(a) of The Exchange Act and provides, in pertinent part:

> "The issuer shall supply such record holder with additional copies in such quantities, assembled in such form and at such a place, as the record holder may reasonably request in order to address and send one copy of each to each beneficial owner of securities so held and shall, upon the request of such record holder, pay its reasonable expenses for completing the mailing of such material to security holders to whom the material is sent." (Emphasis supplied). 17 C.F.R. §240.14a-3(d).

Significantly, the duty of a brokerage firm to mail proxy materials at the request of the issuer of securities is limited to those beneficial owners for whom that brokerage firm then holds such securities of record. As stated in a note to Rule 14a-3(d):

> "The attention of issuers [proxy solicitors] is called to the fact that broker-dealers have an obligation pursuant to applicable self-regulatory requirements to obtain and forward annual reports and proxy soliciting materials in a timely manner to beneficial owners for whom such broker-dealer holds securities." Id.

In similar fashion, Rules 451 and 465 of the NYSE provide for reimbursement to brokerage firms of out-of-pocket

expenses and reasonable clerical expenses incurred in transmitting proxy material, interim reports and other matter to beneficial owners of stock currently held of record by such brokerage firms.* A brokerage firm's duty to transmit such

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* Rules 451 and 465 of the NYSE provide, in pertinent part:

> "Rule 451. (a) Whenever a person soliciting proxies shall furnish a member organization:
> (1) Copies of all soliciting material which such person is sending to registered holders, and
> (2) satisfactory assurance that he will reimburse such member organization for all out-of-pocket expenses, including reasonable clerical expenses, incurred by such member organization in connection with such solicitation.
>
> such member organization shall transmit to each beneficial owner of stock which is in its possession or control the material furnished;..."

> "Rule 465. A member organization, when so requested by a company, and upon being furnished with:
> (1) copies of interim reports of earnings or other material being sent to stockholders, and
> (2) satisfactory assurance that it will be reimbursed by such company for all out-of-pocket expenses, including reasonable clerical expenses, shall transmit such reports or material to each beneficial owner of stock of such company held by such member organization and registered in a name other than the name of the beneficial owner. This rule shall not apply to beneficial owners outside the United States." 2 CCH NYSE Guide ¶¶ 2451, 2465 (1974).

materials is expressly conditioned upon receiving "satisfactory assurance" from the issuer that reimbursement of such expenses will be made. This industry-wide practice is also embodied within the self-regulating provisions adopted by the Board of Governors of the NASD, and particularly by the Interpretation of the Board of Governors of Article III entitled "Rules of Fair Practice". CCH NASD Manual ¶2151, p. 2038 - 3 - 39.

As the foregoing illustrates, the duty of a brokerage firm to transmit various notifications to beneficial owners of securities is not only limited to beneficial owners whose securities are currently held of record, but is expressly conditioned upon the assurance by the issuer that the brokerage firm will be reimbursed for all reasonable expenses incurred in connection therewith. A recommendation by the SEC street-name study that brokers be required to forward to beneficial owners all communications supplied by an issuer is similarly conditioned on the reimbursement of the broker's reasonable expenses. SEC Street-Name Study, Final Report, p. 7. If brokers and nominees are entitled to reimbursement for their reasonable costs and expenses incurred in transmitting routine communications to current shareholders on behalf of an issuer, they are most assuredly entitled to be reimbursed for the burdensome and time-consuming task of searching

their records and extracting and compiling information to identify persons which have disposed of their securities on behalf of private litigants seeking to discharge their obligations voluntarily undertaken on behalf of the entire class.* If successful, plaintiffs will not only benefit from the distribution of any settlement funds but will recover their expenses, including the cost of notice which they are only required to bear "initially", either as part of the administrative expenses payable from any settlement fund or as costs taxed against the losing party. Eisen IV, supra, 417 U.S. at 179. See also Miller v. Alexander Grant & Company, supra, CCH Fed. Sec. L. Rep. [1971 Transfer Binder] ¶93,287 at 91,624. (E.D.N.Y. 1971). However, if those who ultimately stand

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* Plaintiffs' speculation as to the cost of identification is not only misleading but irrelevant. (Pl. Br. at 17, 18). First, the actual number of class members identified by brokers and nominees in searching their stock trading records bears no relationship to the costs incurred as a result of that process. The question of the reasonableness of such costs ultimately rests in the discretion of the court and in no way diminishes the principle discussed above that brokers and nominees are entitled to reimbursement. To the extent that class action plaintiffs are unwilling to pay for the use of computer time, there is always the alternative of working with the original records from which the names and addresses of beneficial owners can be extracted and compiled. However, as held by this Court in Sanders v. Levy, supra, the argument that the costs of notice imposes an unreasonable financial burden on plaintiffs is to be given little or no weight. 21 F.R. Serv. 2d at 1216. As held by the Supreme Court in Eisen IV, "There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." 417 U.S. at 176.

to benefit from this class action are unwilling to bear the costs necessary to vindicate their claims, there is simply no reason why strangers to this action with no stake in its outcome should be required to do so.

One final observation is perhaps appropriate. We recognize that plaintiffs in class actions may seek the cooperation and assistance of members of the securities industries to enable them to discharge their obligations to the class. However, such plaintiffs and their counsel have been generally unwilling to condition their request for such assistance and cooperation upon their agreement to reimburse brokers and nominees for the costs of identification.

In the absence of a voluntary agreement, we submit that it is inappropriate for class action plaintiffs to seek to unilaterally impose the costs of identification upon uninterested third parties, particularly in the form of an ex parte order to which brokers and nominees are not parties and as to which they are denied an opportunity to be heard. In a recent decision in In re Application of the United States of America in the Matter of an Order Authorizing the Use of a Pen Register or Similar Mechanical Device, Docket No. 76-1155 (Slip. Op. 2d Cir. July 13, 1976), this Court declined to compel the New York Telephone Company to provide information, facilities and technical assistance to the

Federal Bureau of Investigation in connection with the surveillance of telephone communications. We submit that this Court's reasoning is equally applicable to the circumstances presented herein:

> "Perhaps the most important factor weighing against the propriety of the order is that without Congressional authority, such an order could establish a most undesirable, if not dangerous and unwise, precedent for the authority of federal courts to impress unwilling aid on private third parties." Slip Op. at 4915.

CONCLUSION

The orders appealed from should be in all respects affirmed.

Dated: New York, New York
March 11, 1977

Respectfully submitted,

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CONSENT TO FILE BRIEF

AMICUS CURIAE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: FRANKLIN NATIONAL BANK SECURITIES LITIGATION	
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff-Appellant,	
-and-	
LOUIS PERGAMENT, Intervenor-Plaintiff-Appellant,	Docket No. 76-7616 CONSENT TO FILE BRIEF AMICUS CURIAE
v.	
ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH and ROBERT C. PANEPINTO, Defendants-Appellees.	

IT IS HEREBY STIPULATED AND AGREED, by and among the undersigned, attorneys for all parties which have appeared in the above-captioned action, and Stroock & Stroock & Lavan, attorneys

for certain interested parties which desire to file an amicus curiae brief in support of the position of affirmance of the order from which this appeal has been taken, that the parties to the within appeal hereby consent to the filing of an amicus curiae brief on behalf of those parties set forth in Schedule A hereto and that said brief shall be filed within the time allowed for Appellees to file their brief herein.

Dated: New York, New York
January 21, 1977

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SCHEDULE A

Bache Halsey Stuart, Inc.

Bear, Stearns & Co.

Blyth Eastman Dillon & Co., Inc.

Bruns, Nordeman, Rea & Co.

Donaldson Lufkin & Jenrette, Inc.

Drexel Burnham & Co., Inc.

First Manhattan Co.

Goldman, Sachs & Co.

E.F. Hutton & Company, Inc.

Hornblower & Weeks-Hemphill, Noyes

Josephthal & Co.

Kidder, Peabody & Co., Inc.

Loeb, Rhoades & Co.

Mitchell, Hutchins, Inc.

Oppenheimer & Co., Inc.

Paine, Webber, Jackson & Curtis, Inc.

Reynold Securities, Inc.

Salomon Brothers

L.F. Rothschild & Co.

Shearson Hayden Stone, Inc.

Shields, Model, Roland, Inc.

Wertheim & Co.

Dean Witter & Co., Inc.

Merrill, Lynch , Pierce, Fenner & Smith, Inc.

Lehman Brothers

Securities Industry Association

ORDER DATED OCTOBER 15, 1976,
PER JUDGE WEINSTEIN,
IN JAHRE V. RAIT
(E.D.N.Y. 74 Civ. 805 and 76 Civ. 1305)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

J. IRVING JAHRE,

Plaintiff,

-against-

JOSEPH M. RAIT, PROFLEX LIMITED and PELOREX CORPORATION,

Defendants.

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
OCT 15 1976
TIME A.M.
P.M.

76 Civ. 805 (JBW)

ORDER

In the Matter of the Order dated May 19, 1976 Per the Hon. Jack B. Weinstein Purporting to Compel Various Brokerage Firms to Render Services Without Reimbursement

76 Civ. 1305 (JBW)

Petitioners Bache, Halsey Stuart, Incorporated, Bear, Stearns & Co., Dean Witter & Co., Incorporated, Drexel Burnham & Co. Incorporated, Hornblower & Weeks-Hemphill Noyes, E.F. Hutton & Company, Inc., Kidder Peabody & Co., Inc., Loeb, Rhoades & Co., Merrill, Lynch, Pierce, Fenner & Smith, Inc., Oppenheimer & Co., Inc., Reynolds Securities, Inc. and L.F. Rothschild & Co. having commenced a special proceeding and petitioned this Court, by Order to Show Cause, for an order annulling, vacating or modifying an ex parte order dated May 19, 1976 issued in connection with the class action proceeding entitled Jahre v. Rait, et al. which directed, inter alia, that

"any Bank, brokerage firm or other nominee which purchased the common stock of Pelorex Corp. for the account of others (beneficial owners) shall immediately transmit to each beneficial owner a copy of the Stipulation of Settlement, Notice to class members and Proof of Claim and request reimbursement for mailing costs, or supply the names and addresses of such beneficial owners to Defendants' counsel without cost ..." and said petition having come on to be heard on October 5, 1976 before the Hon. Jack B. Weinstein and this Court having heard Robert P. Stein and Alvin K. Hellerstein of Stroock & Stroock & Lavan, attorneys for petitioners, in favor of the Petition and Leonard J. Rubin of Lawler, Kent & Eisenberg, attorneys for defendants and Stanley L. Sklar of Rubin, Baum, Levin, Constant & Friedman, attorneys for plaintiff, in opposition to the Petition, it is hereby

ORDERED, that the Order of May 19, 1976 shall be and the same hereby is in all respects vacated.

Dated: New York, New York
October 5, 1976.

Jack B. Weinstein
U.S.D.J.

UNITED STATES COURT OF APPEALS
For the Second Circuit

In Re Franklin National Bank
Securities Litigation

ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated,
Plaintiff-Appellant,
and
LOUIS PERGAMENT,
Intervenor-Plaintiff-Appellant,
against
ERNEST & ERNEST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, and ROBERT C. PANEPINTO,
Defendants-Appellees.

On Appeal From the United States District Court
For the Eastern District of New York

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Antonio Ramos, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 10 Catherine Street, New York, NY 10038
That on March 11, 1977, he served 2 copies of Brief

on Poletti, Freidin, Prashker,
Feldman & Gartner, Esqs.
1185 Avenue of the Americas
New York, NY 10036
Attn: Barbara Lee, Esq.

Milberg & Weiss, Esqs.
One Pennsylvania Plaza
New York, NY 10001
Attn: Jerome Congress, Esq.

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Antonio Ramos

Sworn to before me this
11 day of March, 1977

JOHN V. DISPOSITO
Notary Public, State of New York
No. 30-4643450
Qualified in Nassau County
Commission Expires March 30, 1977